83-5329

CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ROBERT LEWIS BUFORD,

Petitioner,

vs.

LOUIE L. WAINWRIGHT,
Secretary, Department of Corrections,
State of Florida,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED FOR REVIEW

I

WHETHER EFFECTIVE ASSISTANCE OF COUNSEL IS DENIED WHEN, IN A CAPITAL CASE, JURY INSTRUCTIONS WHICH OFFEND DUE PROCESS AND CONSTITUTE REVERSIBLE ERROR ARE NOT APPEALED.

II

WHETHER DUE PROCESS IS VIOLATED WHEN, IN A CAPITAL CASE, A STATE APPELLATE COURT ISSUES TWO OPINIONS WHICH ARE FACIALLY CONTRADICTORY AND ARE BOTH ADVERSE TO PETITIONER.

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IN THE SUPREME COURT OF THE UNITED STATES

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vs.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner, Robert Lewis Buford, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Florida in this cause, rendered on July 12, 1983.

OPINION BELOW

The opinion of the Supreme Court of Florida is not yet reported. The full opinion is Appendix A to this petition.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(3), to review the judgment and opinion of the Supreme Court of Florida issued on March 17, 1983 and rendered on July 12, 1983 upon the denial of a timely petition for rehearing.

RELEVANT CONSTITUTIONAL PROVISIONS

AMEND. VI, U.S. CONST.

> [I]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defen[s]e.

AMEND. XIV, § 1, U.S. CONST.

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was convicted of first-degree murder in the Circuit Court of the Tenth Judicial Circuit of Florida on March 30, 1978. Despite the jury's recommendation that petitioner be sentenced to life imprisonment, the trial judge -- balancing two statutory mitigating factors against two statutory aggravating factors -- on March 31, 1978 sentenced him to death. An appeal was taken to the Supreme Court of Florida, which, on July 23, 1981, affirmed the judgment of first-degree murder and the death sentence entered thereon. Buford v. State, 403 So.2d 943 (Fla. 1981), cert. denied, 454 U.S. 1163 (1982). (Appendix B.)

A petition for writ of habeas corpus was filed in the Supreme Court of Florida on September 23, 1982, alleging that petitioner had been denied effective assistance of counsel on direct appeal due to the failure of his attorney to raise meritorious legal issues in contravention of the Sixth, Eighth, and Fourteenth Amendments. The petition was denied in an opinion dated March 17, 1983. (Appendix A.) A timely petition for rehearing was filed. The petition for rehearing was denied on July 12, 1983. (Appendix C.)

The petitioner was charged with first-degree murder, sexual battery upon a child under 11 years of age, and burglary. The victim, Toni Wright, was killed on November 6, 1977. Petitioner was 19 years old at the time of the homicide. (Appendix B at 947.) Petitioner had no significant history of prior criminal activity. (Appendix B at 947.) Petitioner concededly was present at the scene of the homicide and committed a sexual battery upon the victim before her death.

Defendant testified in his own defense at trial and admitted the sexual battery, but denied killing the young girl. (Appendix D* at 799-800.) He testified that another person -- Darrell Wilson, known in the neighborhood as "Fat Boy" -- also had violated the victim and then, acting alone, had killed her. Petitioner further stated that he had struggled with Wilson in an attempt to prevent Wilson from killing the victim, but had been unable to do so. (Appendix D at 797-800.) When asked why he had initially stated to the police that he alone had killed the girl, petitioner Buford answered that he had been trying to protect his friend Wilson. (Appendix D at 801, 804.)

The trial judge instructed the jurors that they could find petitioner Buford guilty of first-degree murder if they found either (a) that he had killed the victim from a premeditated design to effect her death (Appendix D at 880), or (b) that he had killed her, whether or not from a premeditated design, while engaged in the perpetration of a sexual battery (Appendix D at 882), or (c) that the victim had been killed by a person with whom defendant Buford had associated to commit an unlawful act (Appendix D at 877-78).

In charging the jury, the trial court included the following instruction on "associates":

> When two or more persons combine together to commit an unlawful act, each is criminally responsible for the acts of his associates committed in the furtherance or prosecution of the common design. If two or more persons combine to do an unlawful act and in the prosecution of the common object an unlawful homicide results, all are alike criminally responsible for the probable consequences that may arise from the perpetration of the unlawful act they set out to accomplish. The immediate injury from which death ensues is considered as proceeding from all who are present aiding and abetting the injury done, and the actual perpetrator is considered as the agent of his associates. His act is theirs as well as his own, and all are equally guilty. (Appendix D at 877-78, emphasis added.)

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* Appendix D consists of pages from the transcript of petitioner's trial.

The foregoing was the only instruction relating to associates. Counsel for defendant objected that the instruction, standing alone, was not correct, and he requested that the jury be further instructed that it would be necessary that "the State show that as a principal that Mr. Buford have the conscious intent that the crime [murder] be committed and that he say a word and do an act toward the commission or toward the incitement [of the crime]." (Appendix D at 1041.) The trial court denied the request, and trial counsel's objection was properly preserved for appeal. (Appendix A at 2.)

The instruction on associates clearly and unequivocally implied, in the context of petitioner Buford's trial testimony in which he admitted that the sexual batteries had been part of a common design, that the jury must conclusively presume that Darrell Wilson's killing of Toni Wright was part of a common design concurred in by both Wilson and petitioner Buford. The instruction stated, inter alia, that "[i]f two or more persons combine to do an unlawful act and in the prosecution of the common object an unlawful homicide results, all are alike criminally responsible for the probable consequences that may arise from the perpetration of the unlawful act they set out to accomplish." (Appendix D at 877-878, emphasis added.) The conclusive presumption was directly contrary to petitioner's testimony that he had struggled with Wilson in an attempt to prevent the killing. (Appendix D at 797-800.)

The jury returned general verdicts of guilt. It is therefore impossible to determine which theory or theories of first-degree murder the jury adopted. At the sentencing phase, the jury recommended sentences of life imprisonment for both capital convictions. (Sexual battery upon a child under 11 years of age was, at the time, a capital crime in Florida.) The trial

judge overrode both jury recommendations and imposed two sentences of death.*

On direct appeal to the Florida Supreme Court, counsel for the defendant-appellant inexplicably failed to raise as error the trial court's refusal to supplement the charge on associates. Counsel did argue, however, that the trial court committed error in overriding the jury's recommendation of life imprisonment, because, among other things, the trial court had refused to consider "the possibility that [the defendant] was a mere accomplice . . . ." (Appendix B at 953.) Defendant-appellant's argument was grounded upon FLA. STAT. ANN. § 921.141(6)(d), which provides that, in determining whether or not a sentence of death shall be imposed, it is a mitigating cirumstance that:

> The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

The Florida Supreme Court rejected the defendant's contention on the ground that, as a matter of law, the record would not support a finding that defendant Buford was guilty of first-degree murder as an accomplice. The Florida Supreme Court stated:

> If defendant's testimony were accepted as creating a reasonable doubt, he should not be found guilty of murder in the first degree for his participation in the murder would not be proved. Defendant said he was leaving the scene, turned around when the victim screamed, and saw Fat Boy drop a concrete block on her head.
>
> A convicted defendant cannot be "a little bit guilty." It is unreasonable for a jury to say in one breath that a defendant's guilt has been proved beyond a reasonable doubt and, in the next breath, to say someone else may have done it, so we recommend mercy.

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* On direct appeal, the sentence of death for sexual battery was reduced to life imprisonment. The sentence of death for first-degree murder -- which was grounded upon the trial judge's balancing of two statutory mitigating factors against two statutory aggravating factors -- was affirmed, with one judge dissenting. See Appendix B.

Appendix B at 953 (emphasis added). Thus, the Supreme Court of Florida has already ruled in this case that, if petitioner's testimony regarding the killing of Toni Wright by Darrell Wilson is accepted, then petitioner's behavior did not, under Florida law, amount to first-degree murder.

Moreover, the holding that petitioner's trial testimony is not consistent with a conviction for first-degree murder is compelled by clear and recent precedent of the Florida Supreme Court. In Bryant v. State, 412 So.2d 347 (Fla. 1982), defendant admitted participating with an accomplice in a robbery, but testified that the subsequent homicide was the independent act of the accomplice. Just as in the case at bar, the trial judge refused to instruct the jury that, if the homicide was the independent act of the accomplice, the defendant could not be liable for murder. The Florida Supreme Court agreed with appellant and reversed and remanded for a new trial, holding:

> [T]he felony murder rule and the law of principles combine to make a felon liable for the acts of his co-felons. [Citations omitted.] But this liability is circumscribed by the limitation that the lethal act must be in furtherance or prosecution of the common design or unlawful act the parties set out to accomplish.

412 So.2d at 350 (emphasis added). Thus, the opinion on direct appeal in this case was fully consistent with established principles of Florida law which imply that, if petitioner Buford did not utter a word or do an act to facilitate the homicide and did not intend that anyone be killed, he could not be guilty of first-degree murder.*

However, the instructions given to the jury on associates compelled the jury to presume conclusively that, if Buford

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* Federal law similarly requires that defendant be shown beyond a reasonable doubt to be a knowing participant in the crime of which he or she is convicted. See, e.g., United States v. Manning, 618 F.2d 45 (8th Cir. 1980). Such a principle is of particular importance in a capital case. See Enmund v. Florida, 50 U.S.L.W. 5087 (U.S. July 2, 1982) (No. 81-5321).

and Wilson had acted together in perpetrating sexual batteries on the victim, then Buford must have concurred in a common design to kill Toni Wright. This is precisely the presumption which the requested instruction sought to negative. It follows that, under the Florida Supreme Court's opinion on direct appeal in this case and under its opinion in Bryant v. State, it was reversible error for the trial judge to refuse the additional instruction requested by petitioner's trial counsel. Moreover, regardless of the propriety of the instruction under Florida law, because the instruction embodied a conclusive presumption which took from the jury the task of determining whether or not petitioner had participated in any way in the killing of Toni Wright, the instruction violated petitioner's right to due process. It further follows that petitioner's appellate counsel was not reasonably effective when he failed to raise the instruction on associates as reversible error.

It is equally apparent that the Florida Supreme Court's opinion on direct appeal in this case (Appendix B) is, on its face, inconsistent with its most recent opinion denying the petition for a writ of habeas corpus (Appendix A). In the former opinion, the court stated that if the trier of fact accepts petitioner's testimony that the victim had been killed by Darrell Wilson and that petitioner had tried to prevent the killing, then petitioner could not properly be found guilty of first-degree murder under Florida law. (Appendix B at 953.) In its most recent opinion, the same court has held that, even if the trier of fact accepts petitioner's testimony, petitioner could still be guilty of first-degree murder under Florida law. These decisions are facially contradictory, and each is adverse to petitioner. We submit that due process requires, at a minimum, that the decisions rendered in the same capital case not be contradictory on their face.

REASONS FOR GRANTING THE WRIT

I

EFFECTIVE ASSISTANCE OF COUNSEL IS DENIED WHEN, IN A CAPITAL CASE, JURY INSTRUCTIONS WHICH OFFEND DUE PROCESS AND CONSTITUTE REVERSIBLE ERROR ARE NOT APPEALED

Under the Constitution of the United States and the laws of Florida, petitioner was guaranteed an automatic direct appeal to the Supreme Court of Florida from the judgment and sentence of death imposed by the trial court. See Proffitt v. Florida, 428 U.S. 242, 253 (1976); State v. Dixon, 283 So.2d 1, 10 (Fla. 1973); FLA. STAT. § 921.141 (1977). On direct appeal, the Florida Supreme Court will consider, in addition to points relating directly to the propriety of the imposition of the death penalty, points relating directly to the "guilt" phase of the trial, including points relating to the correctness of jury instructions in that phase. See, e.g., Bryant v. State, 412 So.2d 347 (Fla. 1982); Aldridge v. State, 351 So.2d 942 (Fla. 1977).

Petitioner, an indigent, was entitled to the assistance of counsel on his guaranteed appeal. See, e.g., Anders v. California, 386 U.S. 738 (1967); Douglas v. California, 372 U.S. 353 (1963); Smith v. Bennett, 365 U.S. 708 (1961); Griffin v. Illinois, 351 U.S. 12 (1956). This right to be represented by counsel is, at heart, the right to be represented by effective counsel. Cuyler v. Sullivan, 446 U.S. 335 (1980); McMann v. Richardson, 397 U.S. 759 (1970); Anders v. California, supra. Surely counsel cannot be said to be "effective" if, on appeal, counsel fails to raise reversible errors, properly preserved at trial, in jury instructions. This is all the more true where the appeal is taken in a capital case and the instructions have deprived defendant of rights granted by the federal constitution.*

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* The Court's recent opinion in Jones v. Barnes, 51 U.S.L.W. 5151 (U.S. July 5, 1983) (No. 81-1794), holds that there is no constitutional per se rule requiring defense counsel assigned to prosecute an appeal from a criminal conviction to raise every nonfrivolous issue requested by the defendant. The

(Footnote continued on next page)

Appellate counsel's failure to raise on appeal the issue of the trial court's improper instructions on associates clearly amounted to a substantial and serious deficiency which deprived petitioner of effective assistance of counsel. First of all, the instruction was objected to by trial counsel, and the objection was properly preserved for appeal. (See Appendix A at 2.) It was an especially serious deficiency for appellate counsel not to challenge the instructions which had already been challenged at trial, because the challenged instructions deprived petitioner of his rights under the United States Constitution.

Under applicable standards of due process embodied in the Fourteenth Amendment, the trial court's instructions on associates in this case violated petitioner's constitutional rights. A leading precedent here is the Court's decision in Sandstrom v. Montana, 442 U.S. 510 (1979), which held, among other things, that it was a violation of due process for a Montana court to instruct the jury in such a way as to create a conclusive presumption that an essential element of the crime had been proven when, in fact, evidence had been introduced that supported the contrary inference. See also, Morissette v. United States, 342 U.S. 246, 274 (1952) ("It follows that the trial court may not withdraw or prejudge the issue [of defendants' intention] by instruction that the law raises a presumption of intent from an act."); United States v. United States Gypsum Co., 438 U.S. 422, 435 (1978) ("[A] defendant's state of mind or intent is an element of a criminal antitrust offense which . . . cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent from proof of an effect on prices.")

(Footnote continued from preceding page)

decision in Jones v. Barnes is of little relevance here, because this is a capital case in which the issue not raised on appeal was not only nonfrivolous, it was meritorious. Moreover, none of the considerations of "winnowing out weaker arguments on appeal and focusing on one central issue if possible" cited in Jones v. Barnes (51 U.S.L.W. at 5153) are apposite here. Petitioner's appellate counsel filed a brief in the Florida Supreme Court with eight (8) separate legal points, but failed to raise the erroneous instruction on associates.

In Sandstrom v. Montana, supra, petitioner had been convicted of deliberate homicide. Although petitioner admitted the killing, he denied that it had been committed "purposely or knowingly." The trial judge, over the objection of petitioner's trial counsel, instructed the jury that the law "'presumes that a person intends the ordinary consequences of his voluntary acts.'" 442 U.S. at 513. After the Montana Supreme Court had affirmed the petitioner's conviction, this Court unanimously reversed, stating:

> The Supreme Court of Montana is, of course, the final authority on the legal weight to be given a presumption under Montana law, but it is not the final authority on the interpretation which a jury could have given the instruction.
> . . . .
>
> First, a reasonable jury could well have interpreted the presumption as "conclusive," that is, not technically as a presumption at all, but rather as an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption. Alternatively, the jury may have interpreted the instruction as a direction to find intent upon proof of the defendant's voluntary actions . . ., unless the defendant proved the contrary . . . -- thus effectively shifting the burden of persuasion on the element of intent.

442 U.S. at 516-517. The Court went on to hold that, under either interpretation of the jury instructions, petitioner had been deprived of the Due Process Clause protection "'against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" 442 U.S. at 520, citing In re Winship, 397 U.S. 358, 364 (1970), and Patterson v. New York, 432 U.S. 197, 210 (1977).

Under Florida law, a person is liable for the criminal acts of other persons only if the unlawful act committed by the others is "in furtherance or prosecution of the common design or unlawful act the parties set out to accomplish." Bryant v. State, 412 So.2d at 350. But the instruction on associates given at petitioner Buford's trial clearly compelled the jury to find that, if Buford and his associate had acted together in one crime (sexual battery), then there is a conclusive presumption that Darrell Wilson's subsequent killing of Toni Wright was in furtherance of some common design joined in by Robert Buford. It was

precisely this unconstitutional presumption that petitioner's trial counsel sought to negative with the requested instruction. The instruction on associates required that the jury conclusively presume that Robert Buford had in some way concurred in the killing of Toni Wright. This presumption was contrary to petitioner's testimony at trial and thus deprived petitioner of his rights to due process.

Indeed, the trial court's instruction in the case at bar was, for practical purposes, identical to the instruction condemned by the Court in Sandstrom v. Montana. There, the jury was instructed that the law "'presumes that a person intends the ordinary consequences of his voluntary acts.'" 442 U.S. at 513. In the case at bar, the jury was instructed that those who associate together to commit a single criminal act "are alike criminally responsible for the probable consequences that may arise from the perpetration of the unlawful act they set out to accomplish." (Appendix D at 877-78.) Although worded differently, both sets of instructions had the practical effect of taking from the jury the issue of whether the defendant actually intended that the crime be committed.

The Florida Supreme Court, in its opinion denying the petition for a writ of habeas corpus, fails to address the fundamental issue of whether the instruction on associates was proper. The opinion below states that petitioner's "testimony, if believed by the jury would have been consistent with a felony-murder theory of the case." (Appendix A at 3.) However, the issue here is not whether petitioner's testimony is "consistent" with a felony murder theory. The issue here is whether the trial court's instructions on associates, taken together with the trial court's refusal to instruct on "independent act," amounted to an unconstitutional conclusive presumption. That is, the presumption that if Darrell Wilson and Robert Buford acted together in sexually abusing the victim, then they must have been acting together when Darrell Wilson subsequently killed the victim. For the rea-

sons already stated, we submit that the trial court's instructions did indeed embody that (impermissible) conclusive presumption.

Despite the Florida Supreme Court's most recent opinion, we respectfully submit that it is irrelevant whether or not petitioner's trial testimony is "consistent" with a felony murder theory. The trial judge instructed the jury on three theories of first-degree murder: (a) killing from a premeditated design to effect the victim's death; (b) killing, whether or not from a premeditated design, while engaged in the perpetration of a sexual battery; or (c) killing by a person with whom the defendant had associated to commit an unlawful act. See page 3, above. Although petitioner's testimony may be consistent with a felony murder theory, it is also consistent with a theory of associates and, under Sandstrom v. Montana, supra, the instruction on associates embodied an unconstitutional conclusive presumption.

The Florida Supreme Court may not be permitted to guess as to what theory or theories of guilt the jury adopted. As the Court stated in Sandstrom v. Montana, 442 U.S. at 526:

> But, more significantly, even if a jury could have ignored the presumption and found defendant guilty because he acted knowingly, we cannot be certain that this is what they did do. As the jury's verdict was a general one . . ., we have no way of knowing that Sandstrom was not convicted on the basis of the unconstitutional instruction. And "[i]t has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside. See, e.g., Stromberg v. California, 283 U.S. 359 (1931)." Leary v. United States, 395 U.S., at 31-32. See Ulster County Court v. Allen, ante, at 159-160, n 17, and at 175-176 (Powell, J., dissenting); Bachellar v. Maryland, 397 U.S., at 570-571; Carpenters v. United States, 330 U.S., at 408-409; Bollenbach v. United States, 326 U.S., at 611-614. (Emphasis added.)

Based on the evidence and the instructions in this case, for all we know the jury (a) believed that Darrell Wilson killed Toni Wright, and (b) never considered (because not instructed

to do so by the judge) whether Wilson's killing of the girl was his independent act, without the agreement or assistance of petitioner. Because the jury may have convicted on a charge which required that they presume that petitioner concurred in Wilson's crime, the Florida Supreme Court erred in denying the petition below.

The opinion below also states that the instruction on associates "related directly to petitioner's testimony at trial . . . ." (Appendix A at 3.) This does not, however, demonstrate or imply that the instruction passes muster under applicable constitutional standards. If, as we believe, the instruction embodies a conclusive presumption as to the existence of an essential element of the crime, that defect is not cured by the fact that the instruction is "related" to trial testimony.

The Florida Supreme Court also states:

> Finally, the fact that an unlawful homicide occurred during the perpetration of the sexual battery is sufficient to support a conviction for first-degree murder without the necessity of proving petitioner's specific intent that the murder be effected. (Appendix A at 3.)

But, again, this statement assumes that the jury adopted a felony-murder theory in finding petitioner guilty of murder.* Because the instructions included three distinct theories of first-degree murder and the jury returned a general verdict, it is impossible for the Florida Supreme Court to know which theory or theories the jury accepted. It is, we respectfully submit, improper for an appellate court to base its decision on speculation as to what evidence a jury believed or did not believe. See Sandstrom v. Montana, 442 U.S. at 526. Therefore, the assumption that the jury adopted a felony murder theory does not cure the unconsti-

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* The Florida Supreme Court is here essentially quoting FLA. STAT. ANN. § 782.04(1)(a) which codifies Florida's law of felony-murder and, in relevant part, defines first-degree murder as "[t]he unlawful killing of a human being, . . . when committed by a person engaged in the perpetration of . . . any . . . sexual battery . . . ."

tutional conclusive presumption embodied in the trial court's instructions on associates.

The Florida Supreme Court's most recent opinion in this case states that an "alternative support" for the denial of the petition is that under the indictment the state could properly prosecute under both a theory of premeditation and a theory of felony murder. (Appendix A at 3.) The opinion below cites State v. Pinder, 375 So.2d 836 (Fla. 1979), and other cases. These cases stand for the rule that "the state does not have to charge felony murder in the indictment but may prosecute the charge of first-degree murder under a theory of felony murder when the indictment charges premeditated murder." State v. Pinder, 375 So.2d at 839.

We respectfully submit, however, that the issue here is not whether or not Florida could properly prosecute petitioner for felony murder, but whether or not the instructions on associates were fatally defective. Surely no court could construe Pinder to stand for the proposition that the prosecution may proceed on a theory not articulated in the indictment and the trial judge is also free to give incorrect instructions to the jury on that second theory. What is at issue here is whether or not the trial judge committed reversible error in refusing to instruct that petitioner could not be liable for first-degree murder if the killing was the independent act of Darrell Wilson. This is different from the question whether it was proper to permit the prosecution to introduce a theory of felony murder or a theory of associates.

Finally, in its last attempt to defend the propriety of its decision to deny petitioner's request for a writ of habeas corpus based on ineffective assistance of appellate counsel, the Florida Supreme Court asserts:

> Since the record clearly presents evidence sufficient to support a finding by the jury that the killing was by premeditated design, the charge complained of cannot be said to be harmful . . . even if it were erroneous. (Appendix A at 4.)

Again, this statement assumes that the appellate court may properly speculate as to which of several theories of first-degree murder the jury actually adopted. This Court, in Sandstrom v. Montana, supra, has held to the contrary. See page 12, above. This case was submitted to the jury on three theories of first-degree murder, and one of the theories was unconstitutional because it embodied a conclusive presumption (contrary to testimony at trial) as to the presence of one essential element of the crime of first-degree murder. That there was evidence consistent with other alternative theories does not cure the fatal defect in the unconstitutional one.

The jury instructions pursuant to which petitioner was found guilty of first-degree murder were fatally defective under Florida law and under the Due Process Clause of the United States Constitution. The instructions were objected to at trial, and the objection was properly preserved for appeal. Appellate counsel raised eight separate legal points on direct appeal to the Florida Supreme Court, but failed to challenge the fatally defective jury instructions. We respectfully submit that such failure constituted ineffective assistance of counsel on appeal. Petitioner should not be required to pay with his liberty, and possibly his life, for counsel's failure.

II

DUE PROCESS IS VIOLATED WHEN, IN A CAPITAL CASE, A STATE APPELLATE COURT ISSUES TWO OPINIONS WHICH ARE FACIALLY CONTRADICTORY AND ARE BOTH ADVERSE TO PETITIONER

On the direct appeal of petitioner's sentence of death, appellate counsel failed to challenge the defective instruction on associates. As is demonstrated in Point I, this failure constituted ineffective assistance of counsel on appeal. Appellate counsel did challenge, however, the trial court's refusal to find the statutory mitigating factor that "[t]he defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor." FLA. STAT. ANN. § 921.141 (6)(d). The Florida Supreme Court upheld the trial court's rejection of that mitigating factor, because the petitioner's testimony would not support a conviction of first-degree murder. That is, the appellate court -- without examining the instruction on associates, because not asked to do so by appellate counsel -- assumed that the conviction for first-degree murder implied that the jury had refused to believe petitioner's testimony. In its most recent opinion, in response to petitioner's showing that the instruction on associates implied that petitioner would be guilty of first-degree murder even if the jury accepted his testimony, the Florida Supreme Court has stated that petitioner's testimony would support a conviction of first-degree murder.

Thus, the Florida Supreme Court has rendered two separate decisions in petitioner's case. The first one says that petitioner cannot be guilty of first-degree murder if his testimony is accepted; the second one says that petitioner can be guilty of first-degree murder even if his testimony is accepted. The only thread of consistency is that each decision is adverse to petitioner. It is respectfully submitted that the rendition of facially contradictory appellate decisions in a capital case, each of which is adverse to petitioner, is a denial of due process.

This Court, in Mathews v. Eldridge, 424 U.S. 319 (1976), clearly set forth the factors to be considered in determining whether or not the requirements of due process have been satisfied in a particular case.

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 334-35. All three factors, as applied to the case at bar, argue in favor of the issuance of a writ of certiorari from this Court.

First, Robert Buford's "private interest" which has been affected by the facially contradictory opinions of the Florida Supreme Court is his interest in his liberty and, indeed, his life. There can be no more compelling private interest.

Secondly, the risk of an erroneous deprivation was, under the circumstances, more than a mere "risk"; it was a certainty. No matter how high a court may be, it cannot overturn the laws of logic. Where two opinions are contradictory, at least one must be wrong. The Florida Supreme Court, which held on direct appeal that petitioner could not be guilty of first-degree murder if his testimony were believed, has issued facially contradictory opinions, both of which are decided against petitioner. Such a procedure necessarily, as a matter of logic, irrationally and erroneously deprives petitioner of his right to liberty and life.

Finally, the burdens imposed by the issuance of this Court's writ of certiorari could not be excessive. Granting the writ in this case would not compel the conclusion that, whenever a State court makes an error, this Court will sit in review.

Rather, this is the rare (one hopes unique) case in which the State's highest court issues, in a single case, two separate opinions which on their face contradict each other, and both of which are decided against a petitioner condemned to death.

This Court has emphasized that "death as a punishment is unique in its severity and irrevocability." Gregg v. Georgia, 428 U.S. 153, 187 (1976) (Stewart, J., concurring). Moreover, it is the unvarying rule that, "[w]hen a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed." Id. at 187; Powell v. Alabama, 287 U.S. 45, 70, 77 (1932); Reid v. Covert, 354 U.S. 1, 77 (1957) (Harlan, J., concurring).

A state is not required by the Constitution of the United States to provide a right of appeal from a criminal conviction, but where such a right is provided, it must meet the requirements of the Due Process and Equal Protection Clauses of the Constitution. Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12, 18 (1956); Rheuark v. Shaw, 628 F.2d 297, 302 (5th Cir. 1980); Pate v. Holman, 341 F.2d 764, 770, 773 n. 10 (5th Cir. 1965). Where the state appellate courts act arbitrarily and capriciously in disposing of post-conviction proceedings, the requirements of due process are violated.

In Eaton v. Tulsa, 415 U.S. 697, 699 (1974), this Court held that a state appellate court had denied petitioner his constitutional right to due process when it had sustained a judgment of criminal contempt "by treating the conviction as a conviction upon a charge not made." There can be no doubt, then, that irrational, arbitrary or capricious behavior on the part of appellate courts may properly be deemed to violate due process.

Also illustrative is Gilbert v. Sowders, 646 F.2d 1146 (6th Cir. 1981), where it was held that the Kentucky Supreme Court's failure to grant petitioner's motion for reconsideration of the dismissal of petitioner's appeal was so arbitrary and capricious as to amount to a violation of due process. The issu-

ance of the writ of habeas corpus was affirmed in Gilbert v. Scwders, despite the fact that the petitioner was not under a sentence of death. In the case at bar, where the ultimate sanction has been imposed, the requirements of due process are more demanding. Therefore, the Florida Supreme Court's arbitrary and capricious behavior here should not go uncorrected.

CONCLUSION

Based upon the foregoing, petitioner respectfully requests that the Court issue its Writ of Certiorari to review the decision of the Supreme Court of Florida in this cause.

Dated: New York, New York
August 30, 1983

Respectfully submitted,

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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I, David E. Weisberg, counsel of record for petitioner Robert Lewis Buford, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on September 2, 1983, I served one copy of the annexed Petition for a Writ of Certiorari to the Supreme Court of Florida on the respondent, by mailing said copy, in a duly addressed envelope, with first-class postage prepaid, to respondent's counsel, Charles Corces, Jr., Esq., Assistant Attorney General, 1313 Tampa Street, Suite 804, Park Trammel Building, Tampa, Florida 33602.

I further certify that all parties required to be served have been served.

DAVID E. WEISBERG

CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ROBERT LEWIS BUFORD,

Petitioner,

83-5329

vs.

LOUIE L. WAINWRIGHT,
Secretary, Department of Corrections,
State of Florida

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Pursuant to Rule 46.1 of the Rules of this Court, motion is hereby made that petitioner be allowed to proceed in forma pauperis. Petitioner's affidavit is attached to this motion. Leave to proceed in forma pauperis was sought and obtained in both courts below.

Dated: New York, New York
August 30, 1983

DAVID E. WEISBERG

Fried, Frank, Harris, Shriver
& Jacobson
(A Partnership Which Includes
Professional Corporations)
One New York Plaza
New York, New York 10004
(212) 820-8018

ATTORNEY FOR PETITIONER

IN THE

SUPREME COURT OF THE UNITED STATES

CASE NO.

ROBERT LEWIS BUFORD,

Petitioner,

vs.

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,
State of Florida,

Respondent.

AFFIDAVIT IN SUPPORT OF
PETITIONER'S MOTION TO PROCEED
IN FORMA PAUPERIS

I, ROBERT LEWIS BUFORD, being duly sworn, depose and say: that I am the Petitioner in the above-styled case; that I am presently confined on Death Row at Florida State Prison, pursuant to sentence imposed after a conviction in the Circuit Court for Polk County, Florida, for first-degree murder; that I petitioned the Supreme Court of Florida for a writ of habeas corpus based on ineffective assistance of counsel on appeal; that I now wish to obtain review in this Court of the denial of the petition for a writ of habeas corpus; that because of my poverty I am unable to pay the fees and costs of this proceeding or to give security therefor; that as an indigent defendant I was represented by the Public Defender at trial and on appeal; that I am now represented by pro bono counsel; and that I believe I am entitled to redress and I am making this affidavit in good faith.

Robert L. Buford
ROBERT LEWIS BUFORD

RT

Sworn to before me this
3 day of May, 1983.

Notary Public

NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires Oct. 4, 1986

83 5329

Supreme Court of Florida

No. 62,653

ROBERT LEWIS BUFORD, Petitioner,

v.

LOUIE L. WAINWRIGHT, Respondent.

[March 17, 1983]

ADKINS, J.

We have for consideration a petition for writ of habeas corpus by Robert Lewis Buford whose conviction and sentence of death were affirmed by this Court in Buford v. State, 403 So.2d 943 (Fla. 1981), cert. denied, 454 U.S. 1163 (1982). We have jurisdiction. Art. V, § 3(b)(9), Fla. Const.

Petitioner contends his appellate counsel failed to pursue the substantively viable legal issue of the trial court's improper instruction to the jury on "associates." Petitioner further contends that the failure to present such issue to this Court on direct appeal of his death sentence resulted in his being denied reasonably effective assistance of counsel. U.S. Const. amend. 7.

We will address petitioner's claim by applying the standards adopted by this Court in Knight v. State, 394 So.2d 997 (Fla. 1981), to determine whether counsel for the petitioner provided reasonably effective assistance in the initial appeal.

However, before reaching the merits of this petition we must determine whether trial counsel initially preserved the disputed issue for appeal by objecting to the courts alleged

improper instruction on principals and accessories. Fla. R. Crim. P. 3.390(d).

Rule 3.390(d) reads:

> No party may assign as error grounds of appeal the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects, and the grounds of his objection. Opportunity shall be given to make the objection out of the presence of the jury.

In a bench conference prior to the court's charge to the jury, petitioner's trial counsel specifically requested that the instruction which the trial court intended to give include "requirements that the State show that as a principal that Mr. Buford have the conscious intent that the crime [murder] be committed and that he say a word or do an act toward the commission or toward the incitement . . . [of the crime]." The trial court denied the requested modification and advised counsel, "Okay, your objection can be noted." In response to counsel's question, "And overruled?," the court replied, "And overruled."

We find that the trial court's alleged erroneous instruction to the jury on principals and accessories was properly preserved for appeal. We now proceed to the merits of this petition.

Petitioner contends that appellate counsel effected an injustice upon petitioner when counsel failed to raise the alleged erroneous jury instruction on his initial appeal to this Court, thus violating the principles enunciated in Knight v. State, 394 So.2d 997 (Fla. 1981).

Because we find that appellate counsel provided reasonably effective assistance of counsel in the original appeal, petitioner is not entitled to a belated appeal and therefore the petition must be denied.

In charging the jury, the trial court included the following instruction on principals and associates:

> When two or more persons combine together to commit an unlawful act, each is criminally

> responsible for the acts of his associates committed in furtherance or prosecution of the common design. If two or more persons combine to do an unlawful act, and in the prosecution of the common object an unlawful homicide results, all are alike criminally responsible for the probable consequences that may arise from the perpetration of the unlawful act they set out to accomplish. The immediate injury from which death ensues is considered as proceeding from all who are present aiding and abetting the injury done, and the actual perpetrator is considered as the agent of his associates. His act is theirs as well as his own and all are equally guilty.

Petitioner testified at trial. His testimony necessitated the contested charge being given because petitioner claimed that a person named "Fat Boy" had participated in the prior sexual battery and that he, and not petitioner, had actually killed the victim. This testimony, if believed by the jury would have been consistent with a felony-murder theory of the case. Contrary to petitioner's assertions, based on evidence presented, the jury could have still convicted him of first-degree murder. Malloy v. State, 382 So.2d 1190 (Fla. 1979). The instruction related directly to petitioner's testimony at trial, thus satisfying the requirement that only instructions which have support in the record should be given to the jury. See Griffin v. State, 370 So.2d 860 (Fla. 1st DCA 1979). Finally, the fact that an unlawful homicide occurred during the perpetration of the sexual battery is sufficient to support a conviction for first-degree murder without the necessity of proving petitioner's specific intent that the murder be effected.

Therefore under the facts of this case we find the jury instruction complained of to have been properly given. Therefore, as such, appellate counsel's failure to raise the issue on appeal did not amount to ineffective assistance of counsel under Knight.

As alternative support for the denial of the petition we find that under the indictment the state could properly prosecute under both a theory of premeditation and a theory of felony-murder. Adams v. State, 412 So.2d 850 (Fla.), cert. denied, 103 S.Ct. 182 (1982); Pinder v. State, 375 So.2d 836 (Fla. 1979); Barton v. State, 193 So.2d 613 (Fla. 2d DCA 1966), cert. denied,

201 So.2d 459 Fla. 1967). Since the record clearly presents evidence sufficient to support a finding by the jury that the killing was by premeditated design, the charge complained of cannot be said to be harmful under Knight even if it were erroneous. Vasil v. State, 374 So.2d 465 (Fla. 1979), cert. denied, 446 U.S. 967 (1980); Frazier v. State, 107 So.2d 16 (Fla. 1958).

In order to support a claim of ineffective assistance of counsel under Knight it must be established that the alleged error was prejudicial in fact. This the petitioner has failed to do.

Based on the foregoing, we conclude that the petitioner has failed to establish that he was denied reasonably effective assistance of appellate counsel. Consequently the petition for writ of habeas corpus is hereby denied.

It is so ordered.

ALDERMAN, C.J., BOYD, OVERTON, McDONALD, EHRLICH and SHAW, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Original Proceeding - Habeas Corpus

David Rubman, Lake Alfred, Florida; and David E. Weisberg of Fried, Frank, Harris, Shriver and Jacobson, New York, New York,

for Petitioner

Jim Smith, Attorney General and Charles Corces, Jr., Assistant Attorney General, Tampa, Florida,

for Respondent

Robert Lewis BUFORD, Appellant,

v.

STATE of Florida, Appellee.

No. 54010.

Supreme Court of Florida.

July 23, 1981.

Rehearing Denied Oct. 14, 1981.

Defendant was convicted in the Circuit Court, Polk County, William A. Norris, Jr., J., of murder in the first degree, sexual battery upon child under 11 years of age, and burglary with intent to commit sexual battery. He directly appealed. The Supreme Court, Adkins, J., held that: (1) defendant could be convicted and sentenced for both first-degree felony-murder and underlying felonies; (2) trial court did not improperly limit cross-examination of two state witnesses; (3) sentence of death is grossly disproportionate and excessive punishment for crime of sexual assault and therefore forbidden by Eighth Amendment as cruel and unusual punishment; and (4) imposition of death penalty for murder was proper.

Affirmed.

England, J., concurred as to conviction and dissented as to sentence.

1. Homicide ⇐14(2)

If the evidence shows that the accused had ample time to form a purpose to kill deceased and for mind of killer to become fully conscious of his own design, it will be deemed sufficient in point of time in which to enable killer to form premeditated design to kill.

2. Homicide ⇐145

Where person strikes another with a deadly weapon and inflicts a mortal wound, the very act of striking person with weapon in such manner is sufficient to warrant jury in finding that person striking blow intended result which followed.

3. Criminal Law ⇐29

Where the same act or transaction constitutes a violation of two distinct statutory provisions, test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of facts which the other does not.

4. Homicide ⇐22(2)

Murder in first degree through premeditation requires proof of fact not required in sexual battery: premeditated design to kill.

5. Criminal Law ⇐29

Defendant was properly convicted and sentenced for both first-degree felony-murder and underlying felonies of sexual battery and burglary in light of evidence from which jury could have found premeditation and in light of fact that the two offenses were sufficiently distinguishable so as to permit two convictions and two punishments.

6. Witnesses ⇐269(2)

In criminal prosecution, cross-examination of two state witnesses regarding their knowledge of defendant's nonviolent nature was improper in light of fact that there were no facts elicited by the State upon direct examination relative to the defendant's propensity for violence.

7. Witnesses ⇐268(1)

Cross-examination extends to entire subject matter, and to all matters that may

modify, supplement, contradict, rebut or make clearer facts testified to in chief.

8. Witnesses ⇐274(1)

In criminal prosecution, question defendant asked state witnesses on cross-examination regarding their knowledge of defendant's nonviolent nature was improper in that defendant could only have elicited evidence of his general reputation in community, not specific instances of nonviolence.

9. Criminal Law ⇐986.2(1)

All relevant evidence pertaining to character of defendant and circumstances of crime may be considered by sentencer in Florida.

10. Homicide ⇐354

There was sufficient proof of premeditation so as to impose death sentence upon defendant for murder conviction.

11. Criminal Law ⇐1213

A sentence of death is grossly disproportionate and excessive punishment for crime of sexual assault and is therefore forbidden by Eighth Amendment as cruel and unusual punishment. U.S.C.A.Const. Amend. 8; West's F.S.A. § 794.011(2).

12. Homicide ⇐354

Death sentence imposed on defendant convicted of murder was proper in light of evidence that crime was heinous, atrocious and cruel. West's F.S.A. § 782.04.

13. Homicide ⇐354

In imposing death penalty on defendant convicted of murder, trial court did not err in rejecting mitigating circumstances of extreme mental or emotional disturbance or impaired mental capacity and in discounting the effects of defendant's consumption of alcohol, drugs, and marijuana, in light of testimony presented and in light of fact that defendant was able to give a detailed account of the crime. West's F.S.A. § 782.04.

14. Criminal Law ⇐885

In order to sustain a sentence of death following a jury recommendation of life, facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

15. Criminal Law ⇐986.4(2)

Trial judge is not required to request a presentence investigation before sentencing defendant.

16. Rape ⇐64

Sentence of life imprisonment with requirement that defendant serve no less than 25 years before becoming eligible for parole, imposed on defendant convicted of sexual assault, was an automatic sentence and court had no discretion to change it. West's F.S.A. § 775.082(1).

Jack O. Johnson, Public Defender, and James R. Wulchak and Douglas A. Lockwood, Asst. Public Defenders, Bartow, for appellant.

Jim Smith, Atty. Gen., and Charles Corces, Jr. and Richard G. Pippinger, Asst. Attys. Gen., Tampa, for appellee.

ADKINS, Justice.

This is a direct appeal from a judgment adjudging defendant guilty of murder in the first degree and guilty of sexual battery upon a child under eleven years of age, and imposing two sentences of death. Defendant was also adjudged guilty of burglary with intent to commit a sexual battery and sentenced to a term of years.

In the early morning hours of Sunday, November 6, 1977, Lewis Wright, father of the victim, fell asleep on the living room sofa while he and his children were watching television. His children were on a pallet on the living room floor. Wright awakened about 2:30 or 3:00 o'clock a. m., turned off the television, and went to his bedroom. He did not notice if all of his children were still sleeping on the pallet. On his way to the bedroom he observed that the back door of the house was open, but assumed that the children's grandmother had visited the house while he was sleeping and had exited through the back door.

Lewis Wright awoke again about 7:00 o'clock a. m. and noticed that the victim, his seven-year-old daughter, Toni, was missing. Wright notified police; shortly thereafter the victim's body was discovered next to a nearby church. She was lying on her back in a flower bed, with her dress pulled up around her chest and her underpants a short distance away. There were injuries to her head and dried blood on her head and face. Pieces of a shattered and blood-stained concrete block were found nearby.

At approximately 3:00 o'clock a. m. on Sunday, November 6, 1977, the defendant returned to his father's home where he was greeted by his sister, Annette Buford. She observed him breathing hard, as if he had just been running and saw him carrying his t-shirt and tennis shoes. He had white oxydized paint on his bare back and appeared to be drunk. Defendant told his sister if anyone came looking for him to say that he had been at home since 11:00 o'clock p. m. In a few moments defendant broke down and stated that he might have killed a lady with a brick. He started to implicate a person known as "Fat Boy", but immediately stopped, saying he was not going to involve anyone else.

While at his father's home later in the day, the defendant talked both of leaving home and of turning himself over to police. On Monday night defendant went to the police station, after his sister had talked with police about his role in the crime. He was arrested for murder, sexual battery, and burglary with intent to commit sexual battery. After being advised of his legal rights, defendant signed a written waiver of these rights and blurted out, "I did it." He was again advised of his rights in the interrogation room, and he again waived these rights. In his statement defendant said he broke into Wright's house through a back window. Upon entering, he saw the girl lying there, picked her up, and carried her out the back door. He took her to the church area, had her lie down and remove her clothes. He removed his clothing and then inserted his finger into her vagina. He did not move his finger; he just put it in and later took it out. He admitted penetration with his penis. When the victim started screaming, the defendant picked up a concrete block and dropped it twice on the victim's head. The defendant said he was not trying to kill her but to stop her from screaming. The victim had recognized the defendant.

After the statement was concluded, the defendant signed a consent form to search his room at his father's house for the jeans he had been wearing on the night of the incident. These jeans were recovered. A lab analysis of a blood spot on the jeans indicated that it was of the same type as the victim's blood.

With defendant's consent, the officers secured blood and hair samples from him. While the doctor was examining defendant and taking samples, the doctor pointed out various cuts and scratches on defendant's body. When the doctor was noting a set of scratches, the defendant said, "Those were not made by the little one."

A pubic hair that was discovered in the victim's vagina was consistent in characteristics with the sample taken from the defendant. Both the pubic hair found on the decedent and the sample taken from the defendant contained an unusual "starchy" substance. The child was too young to have pubic hair of her own; she was only seven years old.

At trial, the defendant testified that although he had participated in the sexual battery, a man known as "Fat Boy" had raped and killed Toni. Defendant said he refused to climb inside the Wright home because he was known by them. His testimony was that Fat Boy climbed through the window while defendant stood outside. When Fat Boy did not return for a while, defendant left. A few minutes later defendant met Fat Boy again. This time Fat Boy was carrying Toni Wright. Upon questioning her, Toni said that she knew defendant but did not know Fat Boy. Fat Boy carried Toni to the church area and commanded her to lie down. Defendant admitted having sexual intercourse with Toni while Fat Boy watched. Toni did not

scream while defendant was on top of her. Defendant got dressed and was planning to leave when Fat Boy commenced sexual intercourse with Toni. Toni started screaming. Defendant turned around to face them and saw Fat Boy drop a concrete block on the girl's head. Fat Boy picked up the brick to drop it again and defendant charged at him to prevent it. Fat Boy threw defendant against the wall and dropped the brick again. Fat Boy left when defendant refused to allow him to go home with him.

The police officers learned about Fat Boy and his alleged involvement in the incident from the defendant's sister before the trial took place. After an investigation, Fat Boy was eliminated as a suspect by virtue of an alibi. Defendant was charged by indictment with the offenses of first-degree murder, capital sexual battery, and burglary with intent to commit a sexual battery. The jury found defendant guilty on all three counts. The case then proceeded into the penalty phase of the bifurcated trials. The jury recommended to the court that it impose a life sentence on both the murder and sexual battery convictions. The trial court then made the following findings of fact:

> In making the following findings of fact and conclusions of law the Court has taken into consideration *only* the testimony produced at trial and no other factors.
>
> As to Count One of the Indictment wherein defendant was convicted of First Degree Murder the Court makes the following findings of fact:
>
> 1. As an aggravating circumstance, the capital felony, that is, the murder of Toni Annette Wright, a black female, age seven (7) years, was committed while the defendant, Robert Lewis Buford, was engaged in the commission of the crime of sexual battery. F.A. 921.141(5)(d). The evidence is conclusive that the crime of sexual battery was complete and that sufficient penetration occurred. The defendant's free and voluntary statement to law enforcement officers supports this finding together with his testimony in his own behalf during the trial. The defendant attempted to repudiate his previous confession to create an accomplice by the name of "Fat Boy", however, the Court specifically rejects this testimony as being an untrue and a total fabrication.
>
> 2. As a further aggravating circumstance the Court finds that the capital felony was especially heinous, atrocious and cruel. F.A. 921.141(5)(h). The testimony amply supports a finding that this seven (7) year old child was abducted from her home, while asleep by a nineteen (19) year old adult male, that she was taken to a secluded spot where the defendant brutally sexually assaulted her. After he had fulfilled his lustful desires and ascertained that the victim would be in a position to identify him, the defendant snuffed out the life of this child by crushing her head with a concrete block dropped at heights from at least waist high. The testimony of the pathologist, Dr. Robert Smith, reveals at least three (3) separate crushing wounds and the defendant "admits" to dropping the thirty-two (32) pound concrete block on the victim's head twice. The Court specifically rejects as untrue and as a fabrication, the defendant's testimony that the victim was killed by this so called accomplice "Fat Boy". Dr. Robert Simth viewed the victim's body at the scene and testified that the child was covered with sand and that there was evidence of an extensive struggle. The Court finds that the struggle was between the defendant and the seven (7) year old child and that no other person was involved. The pathologist testified that he found numerous abrasions over the entire body of this child with extensive amounts of blood coming from the nose and mouth areas. Three (3) severe wounds were found in the head area, two (2) on the right side and one (1) almost in the midline in the back of the head, indicating at least three (3) separate blows. The skull was extensively fractured resulting in numerous fragments of the skull becoming depressed directly into the brain. Multiple recent abrasions were found on the child's right arm and on her right chest area.

The pathologist was of the opinion that any of the three (3) separate blows would have been sufficient to cause death and that the child may have lived for at least an hour after the first blow but that she would have lost consciousness fairly rapidly.

The pathologist also testified that he visually observed extensive trauma to the genital area and that his autopsy revealed acute perforation of the hymen resulting in acute hemorrhaging from the hymenal area. The autopsy revealed numerous bleeding points in the lining of the vagina itself and the presence of five (5) cc's of seminal fluid within the vagina.

Although the defendant in his statement and in his testimony denied that the victim made any outcry while she was being sexually abused the Court rejects this testimony as being unbelievable and patently untrue and finds as a matter of common understanding and knowledge that a seven (7) year old virginal child would suffer excruciating pain as her vagina was being penetrated first by the defendant's finger and then by his adult penis.

The standard jury instructions define heinous as meaning extremely wicked or shockingly evil. Atrocious is defined as outrageously wicked and vile. Cruel means designed to inflict a high degree of pain; utter indifference to, or enjoyment of, the suffering of others; pitiless. In the Court's experience of seven (7) years as an Assistant Prosecuting Attorney and six (6) months on the bench, I am not aware of a case where a defendant's conduct more clearly falls within the definition of heinous, atrocious, and cruel.

3. The other aggravating circumstances: F.S. 921.141(5)(a); 921.141(5)(b); 921.141(5)(c); 921.141(5)(e); 921.141(5)(f); 921.141(5)(g), are inapplicable in this case.

As to mitigating circumstances involving both the charge of first degree murder and the charge of sexual battery, the Court makes the following findings:

1. The defendant has no significant history of prior criminal activity. F.S. 921.141(6)(a), and this a mitigating factor.

2. As to F.S. 921.141(6)(b), there is no evidence that the capital crimes were committed while the defendant was under the influence of extreme mental or emotional disturbance. The defendant's mother testified that for several weeks prior to the crime the defendant had been using alcohol and marijuana extensively but the Court finds that this alcohol and marijuana usage do (sic) not result in extreme mental or emotional disturbance.

3. As to F.S. 921.141(6)(c), there is absolutely no evidence that the victim was a participant in the defendant's conduct or that she consented to the act.

4. As to F.S. 921.141(6)(d), the defendant attempted to establish by his testimony that he was merely an accomplice to these offenses and that his participation was relatively minor, however, he did "admit" to having sexual intercourse with this seven (7) year old child, and as the Court has stated above, his testimony that this so called "Pat Boy" was an accomplice is rejected as being untrue.

5. As to F.S. 921.141(6)(e), there is no evidence that the defendant was under extreme duress or under the substantial domination of any person.

6. As to F.S. 921.141(6)(f), there is no believable evidence that the defendant lacked the capacity to appreciate the criminality of his conduct or that his ability to conform his conduct to the requirements of law was substantially impaired. On the contrary, the fact that the defendant sought to eliminate Toni Annette Wright because she would be in a position to identify him supports a finding that the defendant appreciated the criminality of his conduct.

7. As to F.S. 921.141(6)(g), the defendant was nineteen (19) years at the time of these offenses and his age is therefore, a mitigating circumstance. The Court notes, in passing, that as to sexual battery the legislature found that the age of the defendant was a factor to be taken into account in determining whether the sexual battery is a capital crime.

As to Count Two of the indictment wherein the defendant was convicted of sexual battery wherein the victim was eleven (11) years of age or younger and the defendant was over eighteen (18) years of age, the Court makes the following findings of fact:

1. As an aggravated circumstance, the capital felony was especially heinous, atrocious and cruel. F.A. 921.141(5)(h). In support of this finding the Court readopts the findings contained in paragraph 2 above.

2. The other aggravating circumstances to-wit: F.S. 921.-141(5)(a)(b)(c)(d)(e)(f)(g), are inapplicable to this charge.

The trial jury has rendered its advisory sentence to the Court recommending that a sentence of life imprisonment be imposed on the defendant as to each of these capital crimes. Our Florida Supreme Court has stated that the recommendation of the trial jury is to be accorded great weight by the trial judge but I perceive the law still to be that the recommendation of the trial jury is not binding on the trial judge and that I still have the awesome responsibility of making the ultimate determination of whether the aggravating circumstances do in fact outweigh any mitigating circumstances and accordingly whether the death penalty should be imposed. In the following cases the trial judge declined to follow the recommendation of the trial jury and the imposition of the death penalty was subsequently affirmed by the Florida Supreme Court: *Hoy vs. State*, 353 So.2d 826 (1977); *Barclay vs. State*, 343 So.2d 1266 (1977); *Dobbert vs. State*, 328 So.2d 433 (1976); *Douglas vs. State*, 328 So.2d 18 (1976); a case originating from this Circuit; *Gardner vs. State*, 313 So.2d 675 (1975); and, *Sawyer vs. State*, 313 So.2d 680 (1975). A review of the factual statements in these cases leads the Court to the conclusion that this defendant's conduct was at least equal to the conduct of the defendants in each of those capital cases.

It is the ultimate finding and determination of the Court that as to the charge of first degree murder, the aggravating circumstances substantially outweigh the mitigating circumstances and therefore the death penalty should be imposed upon the defendant, the recommendation of the trial jury to the contrary notwithstanding.

As to the charge of sexual battery, the aggravating circumstances outweigh the mitigating circumstances and therefore the death penalty should be imposed upon the defendant, the recommendation of the trial jury to the contrary notwithstanding.

Upon appeal the defendant says that he could not be convicted and sentenced for both the first-degree felony murder and the underlying felonies, sexual battery and burglary, relying upon the principles enunciated in *Pinder v. State*, 375 So.2d 836 (Fla. 1979). *Pinder* was a prosecution for first-degree murder, sexual battery and burglary. The Court commented that the jury could have found defendant guilty of first-degree murder only on the basis of evidence that the defendant killed the victim during the perpetration of the burglary or sexual battery, as there was no evidence of premeditation. Therefore, the Court held, defendant could not be convicted of felony murder and the underlying felony upon which the murder conviction was based. If, in addition to the killing, the defendant commits more than one felony, only one of the felonies need be considered the underlying felony and the defendant may be convicted and sentenced for the other felonies. The Court relied upon *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), and *Harris v. Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977).

In the case *sub judice* there was ample evidence from which the jury could have found premeditation. Although the defendant, at one point, declared that he did not intend to kill the victim; nevertheless, he also said that he dropped the concrete block on the victim "because she knowed me." He also stated that after the sexual

battery he took a cement block, held it "a little higher than the waist—right here" and dropped it on the child. He did it again. This time he lifted it higher. He bent down to see if she was still alive and she was not.

[1, 2] If the evidence shows that the accused had ample time to form a purpose to kill the deceased and for the mind of the killer to become fully conscious of his own design, it will be deemed sufficient in point of time in which to enable the killer to form a premeditated design to kill. *Green v. State*, 93 Fla. 1076, 113 So. 121, 122 (1927). Where a person strikes another with a deadly weapon and inflicts a mortal wound, the very act of striking such person with such weapon in such manner is sufficient to warrant a jury in finding that the person striking the blow intended the result which followed. *See Rhodes v. State*, 104 Fla. 520, 140 So. 309, 310 (1932).

There being adequate proof of premeditation, the principles announced in *Pinder* are not applicable to this case.

[3–5] Defendant also said that the offenses are not sufficiently distinguishable to permit the imposition of cumulative punishment. Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of the facts which the other does not. *Brown v. Ohio*. Murder in the first degree through premeditation requires proof of a fact not required in sexual battery: premeditated design to kill.

It is true, as asserted by defendant, that the double jeopardy clause protects against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). In the absence of proof of premeditated design, this principle would be applicable to the case *sub judice*. The two offenses are sufficiently distinguishable so as to permit two convictions and two punishments.

[6, 7] Defendant also complained that the court improperly limited cross-examination of two state witnesses regarding their knowledge of defendant's non-violent nature. Witnesses Barnes and Hayes were friends of the defendant. Barnes testified as to activities of the defendant until 11:00 o'clock p. m. the night of the homicide. Hayes testified as to his activities until 2:00 o'clock a. m. the same night. On cross-examination the attorney for defendant asked Barnes if he found defendant "to be a quiet, non-violent person." On cross-examination counsel for defendant asked Hayes if he had known defendant "to get violent or anything like that." There were no facts elicited by the state upon direct examination relative to defendant's propensity for violence. It is true that cross-examination extends to the entire subject matter, and to all matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief. *Coxwell v. State*, 361 So.2d 148 (1978). However, the attempted cross-examination in the case *sub judice* was in no way relative to the direct examination of the witnesses. It was improper cross-examination.

[8] In addition the question itself was improper. Defendant had a right to produce evidence of his non-violent character, but this is done through his own witnesses. In any event, he could only have elicited evidence of his general reputation in the community, not specific instances of non-violence. *Prevatt v. State*, 82 Fla. 284, 89 So. 807 (1921); *Reddick v. State*, 25 Fla. 112, 5 So. 704 (1889).

Defendant next contends that section 921.141, Florida Statutes (1977), is unconstitutional because it restricts the mitigating circumstances to be considered to those enumerated in the statute. He says this violates the Eighth and Fourteenth Amendments to the United States Constitution. This question was raised when defendant moved to dismiss or quash the indictment. Also he requested a jury instruction stating that mitigating circumstances which the jury could consider were not limited to those listed in the statute. The trial court denied the motion to dismiss or quash and also denied the requested instruction. The

record does not show that the trial judge precluded defendant from offering any evidence of mitigation. The trial judge correctly ruled that the standard jury instructions adequately covered the instructions on mitigating circumstances.

[9] Defendant argues that the death penalty statute is unconstitutional in light of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), where the Supreme Court held that the limited range of mitigating circumstances which could be considered by the sentencer under the Ohio statute was incompatible with the Eighth and Fourteenth Amendments. The identical attack was made upon the Florida statute in *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979). There the Fifth Circuit held that the Florida statute as applied and construed by the Supreme Court of Florida conforms to the decision rendered in *Lockett v. Ohio*. In several cases this Court has recognized the relevance of non-enumerated mitigating circumstances and utilized them in determining the propriety of the sentence. *See Buckrem v. State*, 355 So.2d 111 (Fla.1978); *McCaskill v. State*, 344 So.2d 1276 (Fla. 1977); *Messer v. State*, 330 So.2d 137 (Fla. 1976); *Meeks v. State*, 336 So.2d 1142 (Fla. 1976); *Jones v. State*, 332 So.2d 615 (Fla. 1976); *Chambers v. State*, 339 So.2d 204 (Fla.1976); *Halliwell v. State*, 323 So.2d 557 (Fla.1975). It is clearly established that all relevant evidence pertaining to the character of the defendant and circumstances of the crime may be considered by the sentencer in Florida. *Lockett* does not invalidate our statute.

[10] Defendant says the imposition of the death sentence upon him for the murder conviction, where he did not possess a purpose to cause the death of the victim, is unconstitutional. This assertion is without foundation in the record. There was sufficient proof of premeditation.

Section 794.011(2), Florida Statutes (1977), provides that whoever being eighteen years or older commits a sexual battery upon a person eleven years of age or younger, is guilty of a capital felony. The defendant was nineteen years of age at the time of the offense and his victim was seven years of age. In his motion to dismiss, defendant challenged the constitutionality of this statute, contending that punishment by death for the crime of sexual battery constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. By denying the motion to dismiss and imposing the death penalty, the trial court held that the statute was constitutional. This question has not been decided under present Florida law. We have recently considered sexual battery cases in which the penalty had been imposed, but we reduced the sentence to life imprisonment in both cases because of the particular circumstances. *Purdy v. State*, 343 So.2d 4 (Fla.), *cert. denied*, 434 U.S. 847, 98 S.Ct. 153, 54 L.Ed.2d 114 (1977); *Huckaby v. State*, 343 So.2d 29 (Fla.), *cert. denied*, 434 U.S. 920, 98 S.Ct. 393, 54 L.Ed.2d 276 (1977).

Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), involved the sentencing of a man convicted of rape upon the verdict of a Georgia jury. The Georgia jury recommended the death penalty and the trial court imposed a death sentence. The Georgia Supreme Court affirmed. The Supreme Court of the United States held that the punishment of death for the rape of an adult woman violates the cruel and unusual punishment clause of the Eighth Amendment because it is grossly disproportionate and excessive in relation to the crime committed. The Court has yet to decide whether the same holds true for the rape of a child under eleven years of age. In its plurality opinion (Justices White, Stewart, Blackmun, and Stevens) the Court noted that Georgia was the only state which authorized a sentence of death when the rape victim was an adult woman. Only two other jurisdictions (Florida and Mississippi) provided capital punishment when the victim was a child. It was then said in the opinion:

Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition does not include the death of or even the serious injury to another person. The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair. We have the abiding conviction that the death penalty, which "is unique in its severity and irrevocability," *Gregg v. Georgia*, 428 U.S. [153] at 187, 96 S.Ct. 2909, [at 2931,] 49 L.Ed.2d 859, is an excessive penalty for the rapist who, as such, does not take human life.

This does not end the matter; for under Georgia law, death may not be imposed for any capital offense, including rape, unless the jury or judge finds one of the statutory aggravating circumstances and then elects to impose that sentence. Ga.Ann.Code § 26-3102 (1976 Supp.); *Gregg v. Georgia*, supra, at 165-166, 96 S.Ct. 2909 [at 2921-2922], 49 L.Ed.2d 859. For the rapist to be executed in Georgia, it must therefore be found not only that he committed rape but also that one or more of the following aggravating circumstances were present: (1) that the rape was committed by a person with a prior record of conviction for a capital felony; (2) that the rape was committed while the offender was engaged in the commission of another capital felony, or aggravated battery; or (3) the rape "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim. Here, the first two of these aggravating circumstances were alleged and found by the jury.

Neither of these circumstances, nor both of them together, change our conclusion that the death sentence imposed on Coker is a disproportionate punishment for rape. Coker had prior convictions for capital felonies—rape, murder, and kidnaping—but these prior convictions do not change the fact that the instant crime being punished is a rape not involving the taking of life.

433 U.S. at 598-599, 97 S.Ct. at 2869 (footnotes omitted).

[11] Justices Brennan and Marshall concurred in the judgment as each believed that the death penalty in all circumstances is cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. Justice Powell concurred in the judgment, but would not prejudge the issue of capital punishment in the case of an outrageous rape resulting in serious, lasting harm to the victim. Justice Burger and Rehnquist dissented. The reasoning of the justices in *Coker v. Georgia* compels us to hold that a sentence of death is grossly disproportionate and excessive punishment for the crime of sexual assault and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment.

We point out that section 782.04, Florida Statutes (1977), defines murder in the first degree as the unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any sexual battery. Since the death sentence *sub judice* is sustained under the conviction of premeditated murder, the constitutionality of the statute imposing the death penalty for sexual battery becomes academic. Capital punishment can be inflicted only once.

The defendant says that the death sentence should be vacated in the murder conviction because there was no evidence to support the finding of the trial judge that the crime was heinous, atrocious, and cruel. Defendant refers us to *State v. Dixon*, 283 So.2d 1, 9 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), where we held that atrocious means outrageously wicked and vile and that cruel means designed to inflict a high degree of

pain with utter indifference to, or even enjoyment of, the suffering of others. Defendant insists that when the facts of this case are compared with previous decisions of this Court the findings of the trial judge cannot be upheld. He cites *Halliwell v. State*, 323 So.2d 557 (Fla.1975). In *Halliwell* the killing arose from a love triangle in which defendant flew into a violent rage after the husband of the woman he loved had beaten her. It was an emotional type of homicide. However, hours later the defendant dismembered the body. We held that the dismemberment of the body *after* death was not *relevant* in fixing the death penalty. Since the dismemberment was not relevant, a killing committed in an emotional rage was not heinous, atrocious, or cruel. In the case *sub judice* there was no emotional rage. The defendant kidnapped a seven-year-old child for the purpose of sexually abusing her and when he felt she could identify him, defendant proceeded to kill her with a cement block.

In *Burch v. State*, 343 So.2d 831 (Fla. 1977), cited by defendant, there was evidence that the defendant was mentally disturbed at the time of the offense. We held this to be a mitigating factor and that this factor was obviously considered by the jury in recommending life and improperly rejected by the trial judge. When this mitigating circumstance was weighed against the aggravating circumstances, the judge's rejection of the jury's recommendation was overturned by this Court. In *Burch* we did not say that the act was not especially heinous, atrocious, or cruel.

In *Chambers v. State*, 339 So.2d 204 (Fla. 1976), the defendant and the victim shared a long-standing relationship which included severe and disabling beatings. Also, the victim had consented to the beatings which caused death. We held that the totality of circumstances and the weighing of mitigating and aggravating circumstances did not warrant the imposition of the death penalty on the defendant.

Jones v. State, 332 So.2d 615 (Fla.1976), cited by defendant, resulted in the approval of the jury's recommendation of a life sentence because the defendant's mental illness was considered as a factor to be weighed.

The imposition of the death penalty was held to be proper in *Washington v. State*, 362 So.2d 658 (Fla.1978), *cert. denied*, 441 U.S. 937, 99 S.Ct. 2063, 60 L.Ed.2d 666 (1979), where the victim was kidnapped and held captive for twenty-four hours before being stabbed to death while tied, spread-eagled and helpless, on a bed, crying out and moaning as the stabbing continued.

Alford v. State, 307 So.2d 433 (Fla.1975), *cert. denied*, 428 U.S. 912, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976), involved a defendant twenty-seven years of age who was convicted of the murder of a thirteen-year-old female. The victim's body was discovered lying atop a trash pile. She had been raped and shot to death, execution style. Her nude body was found blindfolded, with bullet wounds in her head, chest, back and arm. We upheld the death sentence and described the act as being especially heinous, atrocious, and cruel.

[12] The homicides in *Proffitt v. State*, 315 So.2d 461 (Fla.1975), *aff'd, Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (stabbing a man asleep in his bed), and *Spinkellink v. State*, 313 So.2d 666, (Fla.1975), *cert. denied*, 428 U.S. 911, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976) (shooting a sleeping companion), were heinous, atrocious, and cruel. So the instant case certainly qualified as one which is heinous, atrocious and cruel. The mental anguish suffered by the victim preceding the killing is a factor that may be considered in determining whether the act was especially heinous, atrocious, or cruel. *Knight v. State*, 338 So.2d 201 (Fla.1976).

Defendant also cites, in support of his position, the case of *Purdy v. State*, 343 So.2d 4 (Fla.), *cert. denied*, 434 U.S. 847, 98 S.Ct. 153, 54 L.Ed.2d 114 (1977). *Purdy* involved a sexual battery on a child and the imposition of the death sentence was based primarily on the aggravating circumstance of heinous, atrocious, and cruel. We held that the evidence failed to show that the sexual battery of this child was especially aggravated under the terms of the death

sentence law. We pointed out there was no evidence of physical abuse other than the sexual assault and the victim was not physically harmed. The case *sub judice* was more than a sexual assault. There was a kidnapping and physical harm which resulted in death. In *Washington v. State* we observed that the mental anguish experienced by a kidnapped victim awaiting eventual death bears upon the atrocity of the crime. This contention is without merit.

[13] Defendant then contends that the trial court erred in not finding the additional mitigating factors which were present in the evidence. He complains that the trial court rejected the mitigating circumstances of extreme mental or emotional disturbance or impaired mental capacity, discounting the effects of defendant's consumption of alcohol, drugs, and marijuana. Obviously the ability of the defendant to give a detailed account of the crime was inconsistent with the contention that he had a diminished or impaired mental capacity because of excessive consumption of alcohol, drugs, and marijuana. In view of the testimony presented, the trial judge correctly rejected defendant's "drinking" and "drug use" as a mitigating factor. *Jones v. State*, 332 So.2d 615 (Fla.1976), does not avail defendant because in *Jones* there was extensive psychiatric evidence to the effect that the defendant did not know the difference between right and wrong.

Defendant raises the possibility that he was a mere accomplice and that this theory was not considered by the trial judge. During the course of the investigation and during the trial, the defendant did attempt to implicate Fat Boy. This theory was rejected by the trial judge in weighing the evidence produced at the trial.

[14] Defendant contends that the trial court committed error in rejecting the jury's recommendations of life imprisonment, relying upon *Tedder v. State*, 322 So.2d 908 (Fla.1975). In *Tedder* we pointed out that the recommendation of the jury should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

In *Malloy v. State*, 382 So.2d 1190 (Fla. 1979), the Court said:

> We have repeatedly stated that in reviewing the propriety of a death sentence, this Court must weigh heavily the advisory opinion of life imprisonment by the sentencing jury. The facts justifying the death sentence must be clear and convincing in order to overrule the jury's recommendation. Therefore, we must examine this record to determine whether there are clear and convincing facts that warranted the imposition of the death penalty, and, in doing so, we must determine if there was a reasonable basis for the jury's recommendation.

Id. at 1193. (Citations omitted.)

If defendant's testimony were accepted as creating a reasonable doubt, he should not be found guilty of murder in the first degree for his participation in the murder would not be proved. Defendant said he was leaving the scene, turned around when the victim screamed, and saw Fat Boy drop a concrete block on her head.

A convicted defendant cannot be "a little bit guilty." It is unreasonable for a jury to say in one breath that a defendant's guilt has been proved beyond a reasonable doubt and, in the next breath, to say someone else may have done it, so we recommend mercy.

This case is unlike *Neary v. State*, 384 So.2d 881 (Fla.1980), where an accomplice receiving lesser punishment played a significant role in the perpetration of the criminal act. Here the defendant committed the murder or Fat Boy did it. This question was settled by the verdict of guilty.

The trial court reviewed other cases where this Court has affirmed the death penalty after a recommendation by the jury of life imprisonment. The trial judge made a specific finding that defendant's actions in the case *sub judice* at least equaled the conduct in those cases. This finding is supported by the evidence. Consequently, it comes to this Court with the presumption of correctness.

In *Hoy v. State*, 353 So.2d 826 (Fla.1977), *cert. denied* 439 U.S. 920, 99 S.Ct. 293, 58 L.Ed.2d 265 (1978); *Barclay v. State*, 343 So.2d 1266 (Fla.1977), *cert. denied*, 439 U.S. 892, 99 S.Ct. 249, 58 L.Ed.2d 237 (1978); *Dobbert v. State*, 328 So.2d 433 (Fla.1976), *aff'd*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977); *Douglas v. State*, 328 So.2d 18 (Fla.), *cert. denied*, 429 U.S. 871, 97 S.Ct. 185, 50 L.Ed.2d 151 (1976); and *Sawyer v. State*, 313 So.2d 680 (Fla.1975), *cert. denied*, 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed.2d 1220 (1976), this Court found compelling reasons to reject the jury's recommendations.

Unquestionably the Court in each of these cases was swayed by the extreme heinousness and atrociousness of the crimes. So was the trial court in the instant case. In all of the above cases, with the exception of *Dobbert*, the victim was an adult. Here it was a seven-year-old child. She had been kidnapped, subjected not only to sexual abuse, but to the anguish of perceiving that she was about to have her head crushed, and this mental anguish bears on the atrocity of the crime. *Washington v. State*. The trial judge exercised a reasoned judgment, and the facts suggesting a sentence of death were so clear and convincing that virtually no reasonable person could differ.

[15] The trial judge was not required to request a presentence investigation before sentencing the defendant. *Hargrave v. State*, 366 So.2d 1 (Fla.), *cert. denied*, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979); *Thompson v. State*, 328 So.2d 1 (Fla. 1976).

[16] The sentence of death imposed for conviction of sexual assault is vacated. Section 775.082(1), Florida Statutes, mandates a punishment of life imprisonment with a requirement that defendant serve no less than twenty-five years before becoming eligible for parole. This is an automatic sentence, and the Court has no discretion. Sufficient factors are present in this case to create an exception to Florida Rule of Criminal Procedure 3.180 requiring the presence of defendant at sentencing. *See Anderson v. State*, 267 So.2d 8 (Fla.1972). The defendant, for the crime of sexual battery upon a child under eleven years of age, shall be imprisoned for life, with no eligibility for parole during the first twenty-five years.

We have carefully reviewed the evidence in this case and find that the judgments of guilt and the sentence of death for murder, as well as the sentence to a term of years, were appropriate. These judgments and sentences of the trial judge are therefore affirmed.

SUNDBERG, C. J., and BOYD, OVERTON and ALDERMAN, JJ., concur.

ENGLAND, J., concurs as to the conviction and dissents as to the sentence.

Supreme Court of Florida

TUESDAY, JULY 12, 1983

ROBERT LEWIS BUFORD,

Petitioner,

v.

LOUIE L. WAINWRIGHT, etc.,

Respondent.

CASE NO. 62,653

Upon consideration of the Petition for Rehearing filed in the above cause by attorneys for petitioner,

IT IS ORDERED that said Petition be and the same is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

By: _____ Deputy Clerk

TC
cc: David E. Weisberg, Esquire
David Rubman, Esquire
Charles Corces, Esquire

Q Does Darrell Wilson have any nickname or whatever ya'll call it on the street, street name?

A Yeah, I called him Fat Boy.

Q Is he known as Fat Boy by other people?

A Yeah.

Q All right. What happened when you ran into him?

A He was -- when I ran into him he asked me to come go with him to move something, and I didn't know what he was talking about so I went with him. And as we were going up the street passed by my house and was heading towards on up the road towards Toni and them house that way I stagger over in the yard, then I was coming back out. He pushed me on into the yard.

Q About what time was this, do you remember or do you know?

A Yes, it was about, I would say, about 2:30, 3:00 a.m.

Q Then what happened? You are saying you were over in the yard near Toni's house?

A Yeah.

Q What's the address, 41 or something?

A I think it's 91.

Q 91? All right. Then what happened?

A Then I, I was staggering back out the yard. He

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pushed me back into the yard so I didn't know what he was doing. I stand there for a while. Then I find out what he was doing. He went to this window at the back of the house, at the end bedroom, and he asked me to go in there after he done forced the window open. He asked me to go in there but I didn't go in.

So he went in and when he came back I thought he wasn't coming back and so I ran from the house and went up the street. Not up the street, on the sidewalk right there by the church and I walked on him. When he didn't show back up, and then about five minutes he came and he had somebody in his hands. When he got up to me I asked him, "What are you going to do?" And he told me to follow him.

Q To what.

A Follow him.

Q Follow him?

A Yeah.

Q Then what happened?

A I followed him, went in the back of the church. He asked her did she know me, she said, "Yeah." He asked her did she know him; she said, "Naw."

Q Did you know who it was?

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Q Who was that?

A Toni Wright.

Q How do you know Toni?

A From seeing her with my sister keeping her.

Q Your sister kept the child or babysat or something like that for the child?

A Yeah.

Q Then what happened?

A Then after that he told her to lay down and after that I had sexual intercourse with her.

Q What was Fat Boy doing?

A He was watching. Then after he got through watching he got on her and then I watched. About that time I was getting ready to go home because I heard her screaming and I looked back, Fat Boy was -- I think he was pretty penetrating on it, so I got ready to go and I turned around. Fat Boy had a brick in his hand and he dropped it. Didn't hit the girl, the next time he hit her. I just started struggling with him.

Q Struggling with who?

A Fat Boy, Darrell Wilson.

Q Then what happened?

A We were struggling, that's how the struggling

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come upon the dirt being throwed around and stuff. I hit him with my hand and he throwed me up against the wall. That's how I get the paint on my back.

Q What's the size of Darrell Wilson or Fat Boy? How big is he?

A He weighs about, about 205 or 195.

Q Is he bigger than you?

A Yeah.

Q Then what happened? Okay, you were struggling with him and then what happened?

A Then after I got through struggling with him then I came back off the wall, I tried to take the brick from him, which I did. That's how I come upon the brick, and then I throwed it down. I was going to use it on him but I just didn't. Throwed it down and broke it. And I bent down to see was Toni all right, she wasn't. She was dead then.

I told him he killed her and then I told him I was fixing to go home and I ran home.

Q You ran home from behind the church there?

A Yeah.

Q What happened after that?

A After I got home I knocked on the door. At first

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he was with me. He wanted to go in but I told him naw. He left and I knocked on the door, my sister opened the door. After she opened the door I came in. I guess that's how she noticed the paint on my back.

So I went in the bedroom, sat down. I was so nervous, crying, I told her that I had killed somebody -- which I didn't do, you know, that I was involved. I was scared and I was scared for Fat Boy, Moo, Darrell Wilson.

And after that I told my sister and them what happened. I know that --

Q Did you tell your sister or the people at the house about Fat Boy?

A I started to but then I stopped.

Q Why did you stop?

A I didn't want to get him involved.

Q Why?

A He was already in some trouble, I guess, from what he told me he was already in trouble.

Q After this had happened like the next day or two or later on that morning, were you thinking about what had happened?

A Yeah, I was.

Q All right. Were you thinking about leaving town

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A I did.

Q Did you ever, did you ever talk to Detective Hipper about this Darrell Wilson or Fat Boy?

A I think I did.

Q Okay. You have heard the, the tape of your statement, is that correct? The one that was played earlier today?

A That's correct.

Q In that statement did you hear yourself say that nobody else was involved?

A I did.

Q All right. Can you tell the jury why you made that statement?

A I didn't want to -- I didn't want to get Darrell in no trouble because he was already in some trouble and, uh, I thought I would just take it all on myself. And I was thinking about that all along, thinking about telling on him, too; but I just couldn't make no answer to telling on him.

Q Was Darrell in jail on the day you were questioned?

A He was.

Q For something else?

A He was.

Q Did you know that, did you find that out?

A I find it out when I went down.

the aforesaid did enter a structure, to-wit, a dwelling, to-wit, a residence located at 91 Lake Ridge Homes, Lakeland, Florida, a further and better description of which is to the State Attorney unknown, the property of Lewis Wright with the intent to commit an offense therein, to-wit, sexual battery, in violation of Section 810.02 Florida Statutes. This charge includes a lesser charge of attempted Burglary and trespass.

The defendant has entered his plea of not guilty to each of these charges against him; the effect of this plea is to require the State to prove each material allegation of each count in the indictment beyond and to the exclusion of every reasonable doubt before the defendant may be found guilty. It is to the evidence and to it alone that you are to look for such proof.

When two or more persons combine together to commit an unlawful act, each is criminally responsible for the acts of his associates committed in the furtherance or prosecution of the common design. If two or more persons combine to do an unlawful act and in the prose-

cution of the common object and unlawful homicide results, all are alike criminally responsible for the probable consequences that may arise from the perpetration of the unlawful act they set out to accomplish. The immediate injury from which death ensues is considered as proceeding from all who are present aiding and abetting the injury done, and the actual perpetrator is considered as the agent of his association. His act is theirs as well as his own, and all are equally guilty.

The killing of one human being by another is called homicide. Every homicide falls within one of these four classes: justifiable homicide; excusable homicide; murder in the first, second or third degree; and manslaughter. The circumstances of each case determine whether a homicide is justifiable, excusable, murder or manslaughter.

Justifiable and excusable homicide are lawful, murder and manslaughter are unlawful and constitute violations of the criminal laws.

The essential elements of the unlawful homicide together with other matters that must be proved beyond and to the exclusion of every

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highest degree of anger, rage, resentment or exasperation. The heat of passion is anger, rage, resentment or exasperation so intent as to overcome or suspend the use of ordinary judgment and to render the mind of an ordinary person incapable of calm reflection. And a dangerous weapon is any weapon which, taking into account the manner in which it is used, is likely to produce death or great bodily harm.

Justifiable homicide: The killing of a human being is justifiable homicide and lawful when committed by any person in the use of such force as he reasonably believes is necessary to prevent imminent death or great bodily harm to himself or another, or to prevent the commission of a forceable felony.

Murder in the first degree: Murder in the first degree is the unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed or any human being. A premeditated design to kill is a fully-formed, conscious purpose to take human life, formed

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mony cannot always be obtained. Therefore, the law recognizes that it may be proved by circumstantial evidence.

It will be sufficient proof of such premeditated design if the circumstances attending the homicide and the conduct of the accused convince you beyond a reasonable doubt of the existence of such premeditated design at the time of the homicide.

The killing of a human being when committed by a person engaged in the perpetration of or in the attempt to perpetrate any sexual battery is murder in the first degree even though there is no premeditated design or intent to kill. If a person kills another in trying to do or commit sexual battery or while escaping from the immediate scene of such crime, the killing is in the perpetration of or in the attempt to perpetrate such crime.

Murder in the second degree is the killing of a human being by the perpetration of an act imminently dangerous to another and evincing a depraved mind regardless of human

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the perpetration.

MR. REPLOGLE: I understand what the Court is saying.

THE COURT: It's most favorable to him that the killing was done by -- in the testimony most favorable to Mr. Buford, the killing was done by someone who was engaged in the perpetration of the crime.

Okay. I just wanted to call that to your attention.

MR. REPLOGLE: I just also, Your Honor, in thinking about it realized that the instruction there is going to be given on the, the principals modification instruction doesn't include the, the requirements that the State show that as a principal that Mr. Buford have the conscious intent that the crime be committed and that he say a word and do an act toward the commission or toward the incitement and so forth, and

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that is in the standard and apparently is in the law and is proof of a principal's guilt. I would request that it be included in the instruction or proposed modified instruction that is given.

MR. PICKARD: It's not required under the felony murder rule, though.

MR. REPLOGLE: I think if you are arguing principals you are talking about --

MR. PICKARD: I have to prove he -- in this felony murder rule I have to prove he had the intent to commit the underlying felony. I don't have to prove he had the intent to commit the murder.

MR. REPLOGLE: Okay, but I think --

THE COURT: Okay, your objection can be noted.

MR. REPLOGLE: And overruled?

THE COURT And overruled.

MR. REPLOGLE: Your Honor, may I ask the bailiff to remove the easel?

ORIGINAL

Case No. 83-5329

In The

SUPREME COURT OF THE UNITED STATES

October Term 1982

ROBERT LEWIS BUFORD,

Petitioner,

vs.

LOUIE L. WAINWRIGHT,
Secretary, Department of Corrections,
State of Florida,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JIM SMITH
ATTORNEY GENERAL
STATE OF FLORIDA

CHARLES CORCES, JR.
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Counsel for Respondent

OPINION BELOW

The opinion of the Supreme Court of Florida is reported at 428 So. 2d 1389. The opinion of that Court on direct appeal is reported at 403 So. 2d 943 (1981).

JURISDICTIONAL STATEMENT

Respondent does not question the jurisdictional statement as stated in the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Petitioner was convicted in the State of Florida of murder in the first degree and sentenced to death. He appealed to the Florida Supreme Court. Among the issues he raised on appeal was that the trial judge committed error in rejecting the jury's recommendation of life imprisonment. Petitioner had argued that the jury probably had recommended life based on his testimony at trial wherein he testified that, while he had participated in the sexual battery of the child, it was "fat boy" who actually killed her, Buford v. State, 403 So. 2d 943, 945 (Fla. 1981) and that in imposing the sentence of death the trial judge had failed or refused to consider this (probable) finding by the jury. The Florida Supreme Court rejected this argument commenting on the fact that "[i]f defendant's testimony were accepted as creating a reasonable doubt he should not be found guilty of murder in the first degree for his participation in the murder would not be proved" Id. 953 (emphasis supplied), opining:

> A convicted defendant cannot be "a little bit guilty." It is unreasonable for a jury to say in one breath that a defendant's guilt has been proved beyond a reasonable doubt and, in the next breath, to say someone else may have done it, so we recommend mercy.
>
> 403 So. 2d 943, 953 (1981)

Petitioner subsequently filed a Petition For Writ Of Habeas Corpus in the Florida Supreme Court seeking to raise a belated issue contending his appellate counsel was

ineffective because he failed to raise on appeal the issue of the refusal of the trial court to include in its principal and accessory instruction the

> "requirements that the State show that as a principal that Mr. Buford have the conscious intent that the crime [murder] be committed and that he say a word or do an act toward the commission or toward the incitement . . .[of the crime]."

428 So. 2d. 1389, 1390.

The Florida Supreme Court ruled that failure to argue this issue did not constitute ineffectiveness because in Florida the fact that an unlawful homicide occurs during the perpetration of a sexual battery is sufficient to support a conviction for first degree murder without the necessity of proving specific intent that the murder be effected.

REASONS FOR DENYING CERTIORARI

QUESTION ONE

EFFECTIVE ASSISTANCE OF COUNSEL IS DENIED WHEN, IN A CAPITAL CASE, JURY INSTRUCTIONS WHICH OFFEND DUE PROCESS AND CONSTITUTE REVERSIBLE ERROR ARE NOT APPEALED.

Essentially, Petitioner is asking this court to grant certiorari and rule that whenever appellate counsel fails to raise an issue on appeal that he could have raised counsel as deemed to be ineffective. Recently, as Petitioner recognizes, this court had a similar issue: Jones v. Barnes, 77 L. Ed 2d 987 (1983). In Jones this court opined that appellate counsel must be given the latitude to present the issues which he, in his professional judgment, deems need be raised without being hampered by being required to raise all non-frivolous issues which his client desires.

Petitioner attempts to distinguish his case from Jones via a footnote by arguing that his is a capital case in which the issue which was not raised was not only non-frivolous but meritorious. The fallacy of that distinction is that the Supreme Court of Florida specifically held the issue was without merit. In other words the Florida Supreme Court said "even if you had raised the issue you would not have won." Petitioner cannot argue that the Florida Supreme Court erroneously decided that the issue was unmeritorious because it was one involving state law. Barclay v. Florida, 77 L.Ed. 2d 1134 (1983), Alabama v. Evans, 75 L.Ed 921 (1983).

Consequently, we respectfully submit that it would be an exercise in futility for this Court to grant certiorari on this issue. If this Honorable Court were to grant certiorari and rule as Petitioner would want this court to rule it would in effect be holding that appellate counsel is ineffective when he fails to raise an issue, even in instances where he would not have prevailed even if he had raised it.

QUESTION TWO

WHETHER DUE PROCESS IS VIOLATED WHEN, IN A CAPITAL CASE, A STATE APPELLATE COURT ISSUES TWO OPINIONS WHICH ARE FACIALLY CONTRADICTORY AND ARE BOTH ADVERSE TO PETITIONER.

In order to create a specious issue Petitioner attempts to create contradictory rulings out of the two decisions of the Florida Supreme Court by taking two statements made by the Florida Supreme Court out of context.

Petitioner attributes the Florida Supreme Court with having said in 403 So. 2d 943 (1981) that petitioner could

not be guilty of first degree murder if his testimony is accepted (Petitioner's brief p. 16) and later in the subsequent habeas opinion with saying that he could be guilty of first degree murder even if his testimony is accepted. That was not what the Florida Supreme Court said. That court simply said that "[i]f the defendant's testimony were accepted as creating a reasonable doubt he should not be found guilty of murder . . . ' Id at 953. The distinction, which Petitioner refuses to recognize, is manifest. A defendant's testimony even if accepted may not excuse him of crime, but if it is accepted, as creating a reasonable doubt of guilt, it most certainly will. The Florida Supreme Court made the latter statement in response to the argument that the reason the jury recommended life was because they had accepted his testimony to the extent of creating a reasonable doubt as to whether "fat boy" not he had killed the child. The Florida Supreme Court was focusing its statement with respect to whether the Tedder v. State, 322 So. 2d 908 (Fla. 1975) standards were met in overriding a jury recommendation, not on whether Petitioner was or was not guilty of murder in the first degree as an accessory.

Since the basic premise behind this question is faulty, little would be gained in the way of deciding a case of national importance by granting certiorari on this question.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I, CHARLES CORCES, JR., a member of the Bar of the Supreme Court of the United States and counsel fo record for the State of Florida, Respondent herein, hereby certify that on October 5, 1983, pursuant to Rule 33, Rules of the Supreme Court of the United States, I served three copies of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari on Mr. David E. Weisberg, counsel for Petitioner herein, by depositing such copies in the United States Post Office, Tampa, Florida, with first class postage prepaid, properly addressed to One New York Plaza, New York, New York 10004.

Charles Corces, Jr.
OF COUNSEL FOR RESPONDENT

CASE NO. 83-5329

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ROBERT LEWIS BUFORD,

Petitioner,

vs.

LOUIE L. WAINWRIGHT,
Secretary, Department of Corrections,
State of Florida,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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ATTORNEY FOR PETITIONER

ARGUMENT IN REPLY

Respondent asserts that appellate counsel was not ineffective in failing to raise the issue of the instruction on principles/associates. Counsel was not ineffective, we are told, because the Florida Supreme Court has held that the instruction was correct as a matter of State law. Therefore, appellate counsel could not have been ineffective in failing to challenge an instruction which was proper.

There are two things wrong with respondent's argument. First, the Florida Supreme Court never considered whether the principles/associates instruction, considered together with the requested instruction which the trial court refused to give, met the standards of Florida law as set forth in Bryant v. State, 412 So.2d 347 (Fla. 1982). Even a cursory reading of Bryant compels the conclusion that the instructions in the case at bar required the jury to make an irrebutable presumption. The jury was required to presume that if Robert Buford and Darrell Wilson acted together as associates in sexually abusing the victim, then Robert Buford must have been Wilson's associate when the latter killed the victim. Such a presumption contradicts petitioner's trial testimony and violates federal law. See Sandstrom v. Montana, 442 U.S. 510 (1979).

Secondly, even respondent concedes that what the Florida Supreme Court actually held was that "the fact that an unlawful homicide occurred during the perpetration of the sexual battery is sufficient to support a conviction for first-degree murder without the necessity of proving specific intent that the murder be effected." (Brief in Opposition at 2.)

But the jury was given three theories on which it might convict Robert Buford of murder:

(1) premeditated homicide;

(2) felony murder; or

(3) murder by a principal (Darrell Wilson) with whom Robert Buford had associated.

The fact that petitioner's testimony was, arguendo*, consistent with a felony murder theory is irrelevant, when the question to be addressed is whether the trial court committed reversible error in its instructions on principles/associates.

The Court held in Sandstrom v. Montana, supra, that when a jury is instructed as to alternative theories, the unconstitutionality of any one of the theories requires that the conviction be vacated. Sandstrom is a case which is never mentioned in respondent's Brief in Opposition. No wonder: the clear implication of Sandstrom is that the instruction on principles/associates, which required the jury to conclusively preseume (contrary to petitioner's trial testimony) that petitioner had associated with Darrell Wilson when the latter killed the victim, violated petitioner's rights to due process.

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* As petitioner argues in Point II of the Petition for a Writ of Certiorari, the most recent decision of the Florida Supreme Court in this case facially contradicts its prior opinion. The first opinion said that, if the jury believed petitioner's testimony, petitioner could not have been guilty of first-degree murder. The second opinion says that, because the testimony is allegedly consistent with a felony murder theory, the jury could have found petitioner guilty even if it believed his testimony. These two opinions are facially contradictory, and both are adverse to petitioner.

Based upon the foregoing and upon the underlying Petition For A Writ of Certiorari to the Supreme Court of Florida, petitioner respectfully requests that the Court issue its Writ of Certiorari to review the decision of the Supreme Court of Florida in this cause.

Dated: New York, New York
October 17, 1983

Respectfully submitted.

/s/
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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I, David E. Weisberg, counsel of record for petitioner Robert Lewis Buford, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on October 17, 1983, I served one copy of the annexed Reply Brief in Support of Petition for A Writ of Certiorari to the Supreme Court of Florida on the respondent, by mailing said copy, in a duly addressed envelope, with first-class postage prepaid, to responsent's counsel, Charles Corces, Jr., Esq., Assistant Attorney General, 1313 Tampa Street, Suite 804, Park Trammel Building, Tampa, Florida 33602.

I further certify that all parties required to be served have been served.

/s/
DAVID E. WEISBERG